UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE GRACIA AND	§	
MARY GRACIA, ET AL	§	CIVIL ACTION
VS.	§	NO. B91-146 JURY
	§	
BROWNSVILLE HOUSING	§	(Filed Mar. 18, 1994)
AUTHORITY, ET AL	§	

PLAINTIFFS' SUPPLEMENTAL OBJECTION
TO THE COURT'S MAIN CHARGE TO THE JURY

COME NOW Plaintiffs by and through their attorneys of record and respectfully move the Court to reconsider the denial of the submission of the negligence issue in the Court's main charge and would show the Court as follows:

On the occasion of this tragedy, the Plaintiffs were guests of their grandfather Esequiel Gracia, a lessee of the Brownsville Housing Authority. In *Parker v. Highland Park, Inc.* 565 SW2d 312, 514-15, (Tex. 1978) (attached hereto), the Texas Supreme Court held that the Plaintiff, Mrs. Parker, was a dinner guest of Judge and Mrs. Massey at their apartment. Mrs. Parker fell down the darkened stairs at the apartment and was injured. The Texas Supreme Court held that the landlord owed the same duty to Mrs. Parker, as a guest of its tenants, Judge and Mrs. Massey, that it owed to the tenants themselves. 565 SW2d at 515. *Parker* is on all fours with this motion, except for the Brownsville Housing Authority being a governmental entity. However, the Brownsville Housing Authority is not able to avail itself of the elevated duty

afforded by § 101.022 Tex. Civ. Prac. & Rem. Code because the Brownsville Housing Authority is *not* protected by the Texas Tort Claims Act § 101.001, et seq. Tex. Civ. Prac & Rem. Code. The District Court determined that the Brownsville Housing Authority is acting in a proprietary capacity. In *Kerrville HRH v. City of Kerrville* 805 SW2d 377 (Tex. App.-San Antonio 1990, writ denied) the Court held that when a city, that could ordinarily avail itself of the protection of the Tort Claims Act, was sued in a proprietary function (under the Texas Deceptive Trade Practices Act) the Tort Claims Act did not apply.

> Because this suit does not involve a tort claim, the Act is inapplicable. . . . 803 SW2d at 381.

See also *Houston v. Southwest Concrete Const.* 835 SW2d 728 (Tex. App. Houston (14th Dist.) 1992, writ den'd) The statute *clearly* prohibits the application of § 101.003 to actions "arising from (its) proprietary function . . . " Tex. Civ. Prac. & Rem Code § 101.0215. (attached hereto)

Furthermore, the Tort Claims Act does not apply to the individual Defendants in their tort actions. *City of Bedford v. Schattman* 776 SW2d 812 (Tex. App. - Ft. Worth, 1989, no writ) (attached hereto). Thus, *Parker* (cited by the Texas Supreme court in its most recent premises liability decision, *Keetch v. Kroger Co.* 845 SW2d 262 (Tex. 1992)) applies to the Brownsville Housing Authority, also operating in a proprietary function.

Plaintiffs move the Court to grant this objection to the Court's Main Charge and submit an ordinary negligence charge to the jury as requested by the Plaintiffs.

Respectfully submitted,

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